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No. 98-1287

In the Supreme Court of the United States

OCTOBER TERM, 1998

AIRBORNE FREIGHT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

-ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether contributions to multiemployer defined benefit pension plans made by petitioner after the close of its taxable year were deductible in that year under Section 404(a)(6) of the Internal Revenue Code, 26 U.S.C. 404(a)(6).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 153 F.3d 967. The opinion of the district court (Pet. App. 22-27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1998. The petition for rehearing was denied on November 12, 1998 (Pet. App. 57-58). The petition for a writ of certiorari was filed on February 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Pursuant to collective bargaining agreements with various labor unions, petitioner was required to make monthly contributions to several multiemployer, defined-benefit pension plans on behalf of certain of its unionized employees (Pet. App. 3).[1] The amount of monthly contributions required under the collective bargaining agreements was based on a prescribed rate per hour (or unit-of-service) of work performed, multiplied by the number of hours (or units-of-service) of work performed by each covered employee during that month (*id.* at 3, 22-23).[2] For example, under the collective bargaining agreement with the Teamsters union—a plan to which approximately 2,500 other employers also made contributions (D.R. 35, Exh. B at 6)—petitioner was required to make contributions at the rate of $1.94 for each hour worked up to a maximum of 173 hours per month per employee (D.R. 35, Exh. B at 12-14 and attached Exhs. 2-3).[3] At the end of each

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[1] A "multiemployer" pension plan is a pension plan "to which more than one employer is required to contribute" that is "maintained pursuant to one or more collective bargaining agreements." 26 U.S.C. 414(f)(1).

[2] Under multi-employer pension plans maintained pursuant to collective bargaining agreements, the parties "normally agree to contribute at rates specified in such agreement(s) for hours worked by employees, units of production * * * , or a percentage of compensation." H.R. Rep. No. 869, 96th Cong., 2d Sess. Pt. 1, at 53 (1980).

[3] Dianne Fessler, petitioner's Controller of Tax Accounting (D.R. 35, Exh. A at 4-5), testified that she was not aware of any significant differences between the pension plan established under the collective bargaining agreement with the Teamsters union and the other multi-employer plans in issue in this case (D.R. 35, Exh. A at 14).

month, the administrative manager of the trust sent petitioner a pre-printed payment form setting forth a listing of employees that had been reported on the prior month's statement, and the corresponding hourly contribution rate (D.R. 35, Exh. B at 10-11, 15). Petitioner filled in the number of hours worked by each covered employee, added any new employees to the list, and remitted the amount so determined by the 10th day of the month following the month in which the covered services had been performed (D.R. 35, Exh. A at 20; D.R. 35, Exh. B at 15-16 and attached Exh. 1, at 6).

Because contributions to the plan were based on the number of hours worked, and the number of hours worked could not be determined in advance, the trust did not accept contributions based on services to be performed in future months (D.R. 35, Exh. B at 23). The administrator of the trust was not aware of any instance in which a taxpayer made a monthly contribution to the trust that exceeded the contribution required based on the units of service performed during the preceding month and the applicable contribution rate (D.R. 35, Exh. B at 24). On the actuarial reports filed by the trust with the Internal Revenue Service for plan years 1989 and 1990, the trusts reported only contributions with respect to hours worked during 1989 and 1990, respectively (D.R. 35, Exh. B at 30-31 and attached Exh. 4; D.R. 35, Exh. A at attached Exh. 2, at 2).

b. Under Section 404(a)(1) of the Internal Revenue Code, a contribution to a qualified pension plan is ordinarily deductible only in the taxable year in which the contribution is actually paid to the plan trust. As a limited exception to this general rule, Section 404(a)(6) permits a deduction for contributions made *after* the close of the taxable year, but *before* the date that the

taxpayer's tax return for the year is due (including extensions), *if* the contributions are made "on account of" the previous taxable year. 26 U.S.C. 404(a)(6). In Rev. Rul. 76-28, 1976-1 C.B. 106, the Internal Revenue Service ruled that a payment may be considered to be "on account of" the preceding taxable year if it "is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer."

Section 404(a)(1) also provides rules governing the maximum amount of deductible contributions to qualified plans. In the case of a collectively bargained pension plan, the deduction limit of Section 404(a)(1) is determined "as if all participants in the plan were employed by a single employer." 26 U.S.C. 413(b)(7). For such plans, contributions by employers are not considered to exceed such limitation if "anticipated employer contributions for such plan year (determined in a manner consistent with the manner in which actual employer contributions for such plan year are determined) do not exceed such limitation." *Ibid.*

Prior to the end of its tax year on December 31, 1989, petitioner computed its deduction for contributions to the multiemployer plans by adding the 12 contractually required monthly contributions made in respect of hours of covered services worked during the year (Pet. App. 3). After obtaining an extension of time to file its return for that year, however, petitioner sought to deduct not only the 12 contributions made in respect of services performed during 1989 but, purporting to rely on Section 404(a)(6), also deducted eight additional monthly contributions made in respect of services performed after the close of that year—the period from January through August 1990 (Pet. App. 4). On its 1990 tax return, petitioner deducted the contributions for

the last four months of 1990 plus the first eight months of 1991, for a total of 12 months' contributions (*Ibid.*).

c. The Internal Revenue Service disallowed deductions for contributions resulting from hours worked after the close of petitioner's taxable years. The Service allowed deductions only for the 12 contributions paid in respect of covered services performed in each taxable year (Pet. App. 4). Petitioner paid the resulting tax and commenced this refund suit in district court.

2. The district court granted petitioner's motion for summary judgment (Pet. App. 22-27). The court concluded that, since all contributions to the plans were deposited in "one single pooled fund," and neither the amount nor the timing of the contributions affected the benefits payable to employees, the plans treated contributions made after the close of the taxable year in the same manner that it treated contributions made before the end of the taxable year (*id.* at 24-25).

3. The court of appeals reversed on the authority of its decision in *Lucky Stores, Inc.* v. *Commissioner*, 153 F.3d 964 (9th Cir. 1998), petition for cert. pending, No. 98-1279 (Pet. App. 2). In *Lucky Stores*, the court of appeals concluded that the additional contributions that the taxpayer sought to deduct for periods after the close of the tax year "were required to be paid because of work done during the [subsequent] taxable year * * * , not the previous year" (Pet. App. 16). Because the payments were not "on account of" the prior year, the court concluded that the "bare language" of Section 404(a)(6) "precludes the deduction of those payments" in the prior year (*ibid*).

The court of appeals in *Lucky Stores* also rejected the assertion of the petitioner that, because the contributions were pooled and did not affect the defined benefit of any individual employee, the payments satisfied the

"same treatment" requirement of Rev. Rul. 76-28 (Pet. App. 17-19). The court explained in *Lucky Stores* that this contention simply ignores (i) that the taxpayers are contractually obligated to make each contribution near the end of each month; (ii) that the amount of each contribution is based on hours or weeks of service rendered during the immediately preceding month; (iii) that plan administrators monitored the dates of receipt of monthly contributions, and were empowered to assess interest charges and late fees on delinquent accounts; (iv) that plan administrators were not prepared to process contributions in excess of the required monthly amounts, and petitioner made no advance contributions; and (v) that plan administrators treated each remittance as fulfillment of petitioner's required contribution for a discrete month (*Id.* at 18). The court stated in *Lucky Stores* that such facts establish that the plans did *not* treat the additional contributions in the same manner they treated contributions made on the last day of petitioner's taxable year (*Id.* at 18-19).

The court in *Lucky Stores* also rejected any reliance on the private rulings that the taxpayers claim reveal an administrative practice of allowing the deductions. The court stated that "[t]axpayers other than those to whom such rulings or memoranda were issued are not entitled to rely on them. * * * Nor could the IRS establish a binding practice in conflict with § 404(a)(6)" (Pet. App. 19 n.5).

In *Lucky Stores*, the court stated that the history of Section 404(a)(6) shows that its purpose is to allow employers sufficient time after the close of their taxable year to calculate the maximum contribution deductible under Section 404(a). The court emphasized that its decision comports with that legislative purpose (Pet. App. 19).

4. In a separate case involving virtually identical facts and issues, the Tenth Circuit reached the same result reached by the Ninth Circuit in *Lucky Stores* and in the present case. *American Stores Co.* v. *Commissioner*, 108 T.C. 178 (1997), aff'd, No. 97-9025, 1999 WL 122996 (10th Cir. Mar. 9, 1999). That decision was entered after the petition for a writ of certiorari was filed in this case.

ARGUMENT

This case presents the same question concerning the proper interpretation of Section 404 of the Internal Revenue Code that is presented in *Lucky Stores, Inc.* v. *Commissioner*, No. 98-1279. For the reasons stated in our brief in opposition in that case, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other appellate court.[4] Further review is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] We are providing herewith to petitioner a copy of our brief in opposition to the petition for a writ of certiorari in *Lucky Stores, Inc.* v. *Commissioner*, No. 98-1279.